

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIF LICENSING, LLC,)
Plaintiff,)
v.) Civ. No.
AGERE SYSTEMS, INC.,) 07-170-JJF
Defendant.)

MONDAY, SEPTEMBER 21, 2009
3:35 p.m.
Courtroom 4B
Suppression Hearing

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.,
United States District Court Judge

APPEARANCES:

POTTER, ANDERSON & CORROON, LLP
BY: PHILIP A. ROVNER, ESQ.

-and-

McDERMOTT, WILL & EMERY
BY: MICHAEL CONNOLLY, ESQ.
Counsel for Plaintiff

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
BY: JEFFREY THOMAS CASTELLANO, ESQ.

-and-

TOWNSEND, TOWNSEND, AND CREW, LLP
BY: DANIEL S. YOUNG, ESQ.

-and-

LSI CORPORATION
BY: MARIE MacNICHOL, ESQ.
Counsel for Defendant

1 THE CLERK: All rise.

2 THE COURT: Good afternoon. Be
3 seated, please. Do you want to announce your
4 appearances?

5 MR. ROVNER: Good afternoon, Your
6 Honor. Phil Rovner from Potter, Anderson, and
7 Corroon for Plaintiff GE Licensing. With me is
8 Mike Connolly from McDermott, Will, and Emery.

9 THE COURT: Good afternoon.

10 MR. CASTELLANO: Good afternoon,
11 Your Honor. Jeff Castellano from Young,
12 Conaway, Stargatt, and Taylor for Defendant
13 Agere Systems.

14 With me at Counsel table are Dan
15 Young from Townsend, Townsend, and Crew.

16 MR. YOUNG: Good afternoon, Your
17 Honor.

18 THE COURT: Good afternoon.

19 MR. CASTELLANO: And Marie
20 MacNichol from the client, and behind them are
21 Dwight Kempf and Surinder Rai, also from LSI,
22 formerly Agere.

23 THE COURT: Good afternoon.

24 All right. We have received --

1 clerk of the court received, as you know, a
2 letter request from a Lindsey Bonner from
3 Westlaw Court Express in Washington, D.C., and
4 the letter request sets forth a request for
5 trial exhibits that were admitted into evidence
6 during the February 2009 trial, and I have
7 received letters from the parties setting forth
8 their position, and I thought it would be
9 helpful if I got you folks in to have a
10 discussion about this request.

11 As you know, in this Circuit there
12 are cases that talk about once a trial
13 commences, that the trial record, including
14 exhibits, is a matter of public record, and
15 there is some language in those cases that sets
16 a pretty strict standard for when a trial court
17 or district court would not allow exhibits to be
18 in the public record.

19 So I thought it would be helpful
20 if you made some record of the -- not of each
21 one, but at least representatively -- of the
22 exhibits asked for, and I have the opportunity
23 to answer some questions.

24 So who wants to go first because

1 there's Plaintiffs and Defendant's exhibits, and
2 I have letters from third parties, I think.
3 Motorola.

4 Do you want to start?

5 MR. CONNOLLY: Certainly, Your
6 Honor. Michael Connolly for Plaintiff GE
7 Licensing.

8 The documents that we noted in our
9 letter that we are objecting to fall into a few
10 different categories.

11 One is, kind of, internal
12 organizational documents. There's the JTX 21,
13 the limited liability company agreement of CIF
14 Licensing. This was marked "Confidential.
15 Outside attorney's eyes only." It was
16 tangentially referred to in trial.

17 Just to be clear, anything that's
18 on the trial record we're not trying to stuff
19 back in the bottle on any of these documents.
20 The portions were read. If they were discussed,
21 that's in the public record. We're just talking
22 about the documents themselves.

23 And in that case there's a
24 particularized harm that comes from how GE and

1 CIF have internally structured their
2 organization, is the type of document that's
3 given protection. It's a highly sensitive
4 internal document that sets forth ownership and
5 the general purpose of CF Licensing.

6 There's also a group of
7 Motorola-related documents, and, as you've
8 mentioned, you got a letter from Motorola
9 expressing their opinion, which is in agreement
10 with Agere and GE, that these documents should
11 not be made public.

12 THE COURT: Let me ask this
13 question: Can we all agree, when you read the
14 rule, that a nonparty -- essentially a witness
15 -- has a much lower threshold when documents
16 they've produced are utilized to establish
17 protection --

18 MR. CONNOLLY: Lower threshold to
19 establish protection.

20 THE COURT: -- or do you think you
21 have the same balance of the standard?

22 MR. CONNOLLY: That sounds right.
23 I think in that case, you know, stepping through
24 it, a third party produces documents under the

1 protective order and thereafter assumes that
2 that protective order is going to be held by its
3 terms, whether trial or before trial.

4 So when you produce something as a
5 third party under a confidentiality setting that
6 says it's going to remain in the public eye, I
7 think that third party certainly has a right to
8 expect it keeps out of the public eye. Even if
9 something happens that puts it in, it's not
10 their fault or to their detriment.

11 Here, where you're being asked to
12 put them in the public eye, I think you're
13 right. The sequence in this particular case,
14 Motorola certainly expected those things to
15 remain confidential.

16 Now I'm going argue for Motorola
17 but --

18 THE COURT: Does the rule say
19 anything when you get stuff in discovery from
20 third parties? I mean, absent a specific
21 agreement. Do you know?

22 MR. CONNOLLY: I don't know, Your
23 Honor. I do know that everything we're
24 discussing here today was received under the

1 protective order and marked under it, so to the
2 extent that that takes precedence --

3 THE COURT: All right. Let me
4 just take a look here.

5 Okay. Go ahead.

6 MR. CONNOLLY: Just move ahead?

7 THE COURT: Move ahead, and I'll
8 --

9 MR. CONNOLLY: Sure.

10 The JTX 33, JTX 35 that have been
11 requested were both Motorola-produced documents,
12 again, marked "Confidential. Attorney's eyes
13 only."

14 JTX 35 may also contain another
15 third party's confidential information,
16 [REDACTED] all, again, which were produced under
17 the protective order and treated by all parties
18 as confidential up to this day.

19 And then the next group of
20 documents, which are GE's highly sensitive
21 internal documents describing [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

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[REDACTED]

I think while who was requesting these documents may or may not matter, it does help with the particularized harm and context.

[REDACTED]

The pattern of the requests clearly indicate some type of competitive interest in the license rates being charged, the particular sales of Agere.

And what that goes to is that it's clearly information that is highly confidential but also highly valuable to someone in a competitive position, in a position of needing a license to get the inside track on information that they would otherwise have no possible access to, and so they make this request and try to get it through other means.

The harm that that would bring is a direct business harm to GE, and it is, I think, in line, direct line, with prior cases which have protected that same type of information, and that would include: DX 167, DX 180, DX 183, DX 184, DX 286, DX 287, DX 288, DX 290, DX 291, and PPX 188.

1 And that completes the documents
2 that GE has noted off the list as -- that should
3 not be disclosed.

4 So they generally fit into those
5 three categories, and I think there's a
6 particularized harm for each one, each document
7 individually and along those categorical lines.

8 THE COURT: With the governing
9 document, is it the case that that's available
10 someplace else publicly?

11 MR. CONNOLLY: It's my
12 understanding that it's not, Your Honor --

13 THE COURT: And --

14 MR. CONNOLLY: -- and we certainly
15 never treated it that way. It's been treated by
16 all parties as confidential since it's been
17 produced.

18 THE COURT: What's in the
19 governing document, such as the purpose of the
20 entity, isn't available anywhere else?

21 MR. CONNOLLY: Well, you know, we
22 could -- I guess we could go through the
23 document and identify whether certain sections
24 or what they embody may be available publicly,

1 but certainly there are -- there are going to be
2 things that are not that may include the
3 purpose. I'm not certain.

4 But the document as a whole
5 certainly encompasses the particular structure,
6 corporate structure, of CIF Licensing, the
7 licensing entity that owns these patents.

8 Again I think the particularized
9 harm comes into focus when you think about a
10 competitor or potential licensee. If they had a
11 wish list that they could know about someone who
12 is licensing patents, this is the wish list:
13 How is the company structured? Who am I dealing
14 with? What do they charge other licensees?
15 What are the licensees' exact sales? That sort
16 of thing.

17 And I think all of those would be
18 harmful, and that includes the operating
19 agreement which sets forth exactly how CIF
20 licensing is structured from a corporate
21 standpoint.

22 THE COURT: You mentioned it, but
23 the requesting party. Is that some agent?

24 MR. CONNOLLY: It's my

1 understanding it's Westlaw Court Link. Someone
2 can pay a fee and have them obtain court
3 documents. I think we probably do. Usually
4 it's a transcript or something else where we
5 need some personal service.

6 In this case we don't know who the
7 actual requester is because it's somebody who
8 has assumedly hired Westlaw Court Link to go get
9 these and fight this fight.

10 THE COURT: You've indicated it
11 may not make a difference, but would it be since
12 -- Westlaw Court Express?

13 MR. CONNOLLY: Court Express, sir.

14 THE COURT: Would it be important
15 to know, given the assertion of the need for
16 protection, who the real party making the
17 request is?

18 MR. CONNOLLY: I think it would,
19 Your Honor. I think what would happen is if the
20 real party was revealed, the particularized harm
21 would become crystal clear because as much as
22 you can guess off of the tea leaves of what
23 document is requested, we're going to find out
24 it's somebody who is in this business, in

1 competition with Agere, potentially involved
2 with GE.

3 And again the particularized harm
4 will become readily apparent. I think that
5 there has been a showing of particularized harm,
6 absent whoever the requester is, that it doesn't
7 need to matter who the requester is to have the
8 harm.

9 So say it's, you know, someone
10 sitting in their home in Ohio and just decided
11 on a whim to get these documents. You don't
12 need to show a harm because of that particular
13 situation. The harm can exist through any means
14 because once they're out, they're out, and
15 anybody can use them.

16 I think here, however, if we were
17 to find out who the real requester is -- first
18 of all, if the request was made, we might find
19 all this go away because they're not willing to
20 come up personally, or we'll see that the
21 particularized harm is very apparent.

22 THE COURT: So are you requesting
23 that the Court respond to Westlaw Court Express
24 with a request to advise who they are asking on

1 behalf of?

2 MR. CONNOLLY: I think, first off,
3 again, regardless of who's asking, there is
4 particularized harm with these documents that
5 makes it moot from a sense of, it doesn't matter
6 who's asking. The harm is apparent. They
7 shouldn't be released.

8 If the Court is inclined to obtain
9 more briefing or get more information about
10 these documents, I think the first step should
11 be to find out who's requesting because from
12 that point we can then, I think, focus on the
13 particularized harms to both Agere and GE, kind
14 of move away from the generalities of what may
15 happen, which is what these inquiries are
16 particularly about, to here is is exactly what
17 will happen if these things come out.

18 Again I don't think it's necessary
19 from the standpoint of particularized harm
20 exists whoever that person is. In some sense I
21 think this kind of time-consuming thing can go
22 away.

23 THE COURT: Reading the cases,
24 there are, you know, different sensitivities

1 that judges apparently have, and I was surprised
2 to see the range of decisions, and I thought
3 initially, well, maybe it's divided in trial
4 courts and appellate courts. But the range of
5 sensitivity was all over the place, and it
6 didn't really have a home in the trial courts or
7 the appellate courts.

8 Some panels, I was surprised at
9 what they thought didn't deserve protection, as
10 well as I was surprised by some trial courts who
11 didn't seem to see the need for protection, as
12 well as on the other side of things, that the
13 requests that they thought should be
14 countenanced and provided protection.

15 And so I'm just trying to
16 understand what's the best way. I mean, as you
17 read all the cases, it's really -- there's -- I
18 mean, there's not a really fixed standard. It
19 really is subject to the circumstances of the
20 particular case, and it just seems to me that if
21 a competitor is trying to get access to what
22 they wouldn't want you to have access to if they
23 were in litigation, that kind of a reverse test,
24 it's a little easier to make a finding rather

1 than -- I think your words were "trying to read
2 the tea leaves," although because I appreciate
3 your general sense that, gosh, anyone that saw
4 this would know that there is implicit harm in
5 the release to the public.

6 I'm not so sure, on review, if
7 this thing got carried on, that that would be
8 enough. I don't know if I'm making myself
9 understandable.

10 MR. CONNOLLY: Absolutely, Your
11 Honor. I think it would. I think what might
12 help is if this goes beyond today --

13 THE COURT: Wouldn't you like to
14 know if in this Circuit a competitor could get
15 that kind of information despite all the private
16 protections endorsed by the court protective
17 orders, that they felt that this presumption
18 that's a little bit of the language in one of
19 the cases, that once it's in the trial record,
20 it's out there?

21 MR. CONNOLLY: I think, Your
22 Honor, that these are the kind of documents that
23 could stand the test of time absent knowing who
24 requested it, but, like I said, if we're

1 inclined to move this beyond today, I think that
2 would be the first step, and it may well be that
3 it all goes away because that person is not
4 willing to say, "I'm the guy that did this."

5 If they do, we could get very
6 specific or particular about our particular
7 harm. I think those -- that's the right way to
8 go if this goes beyond today, if this needs to
9 go beyond the points we've made in our letter or
10 the points I've made in front of you today.

11 THE COURT: Well, you know, and I,
12 kind of, am empathetic to the idea that if I was
13 in the party's position here and somebody was
14 coming at me and the Courts were telling me, "If
15 it's public, it's public." Well, whoever made
16 the request ought to be public too. We all
17 ought to be public.

18 MR. CONNOLLY: I agree, Your
19 Honor.

20 THE COURT: We ought to be
21 transparent. Transparency. Put the light on
22 everything here.

23 All right. Thank you.

24 MR. YOUNG: Thank you, Your Honor.

1 Good afternoon. Dan Young from Townsend,
2 Townsend, and Crew representing Agere LSI.

3 With respect to the documents that
4 are requested that Agere has objected to -- and
5 I understand and sympathize reading all these
6 cases and the various sensitivities that Courts
7 have given with respect to various documents --
8 one thing they've been uniform on, no dispute as
9 to, is that trade-secret information has always
10 been protected as a baseline rule. In other
11 words, if it's trade secret it has protection
12 within the courts of both the District of
13 Delaware and the Third Circuit.

14 THE COURT: That's why I was
15 asking. I had a Coke case, and their formula
16 was so jealously guarded.

17 So I do agree with you that
18 forever they protected trade secrets. It gets a
19 little dicy when it's governing agreements.

20 So I think we can all agree on
21 trade secrets. That's an easy one.

22 MR. YOUNG: Yes, Your Honor.

23 I have no view as to whether GE's
24 documents are trade secrets. I can't argue to

1 that.

2 As far as Agere's documents, they
3 are unquestionably trade secrets. I will be
4 able to speak to these documents. If Your Honor
5 would like more specific testimony from Agere
6 itself, we have Mr. Surinder Rai and Mr. Dwight
7 Kempf here who can speak to any of your
8 questions about the trade-secret status of these
9 documents.

10 THE COURT: Why don't you make a
11 proffer of what they would say to ease the
12 process. I think it's good to have that in the
13 record.

14 MR. YOUNG: Yes, sir. These
15 documents are incredibly important to Agere. We
16 have gone out of our way to get witnesses here
17 to speak to them, but I will proffer to what
18 they would say, but if Your Honor has any
19 further questions, we could have them take the
20 stand, and they could give you any additional
21 information you would like.

22 With respect to the first category
23 of the documents, I'll speak to JTX 16, which is
24 the modem profit-and-loss statement of Agere

1 over numerous years. This document is
2 incredibly important and a trade secret. It is
3 confidential financial information that has
4 very, very detailed specifications, detailed
5 both with respect to the costs, all the various
6 costs that Agere has in this business, and the
7 profitability or margin for all its products.

8 If this document is released to
9 anybody, then the public has access to exactly
10 how Agere runs its modem business. As an
11 example, if I were a competitor and had this
12 document, I could know pricing points. I could
13 know market strategies. I could find a way to
14 undercut the price because I know exactly how
15 much it costs Agere to make its various modems.
16 So the harm would be significant.

17 In addition, if I were a party
18 like GE who has patents with a license, that can
19 drive negotiations. So it would be incredibly
20 detrimental to Agere that that information would
21 be released to the public.

22 So for the trade-secret
23 perspective, it's confidential financial
24 information, and it would be and it is kept

1 secret within Agere. Not everybody at Agere can
2 get access.

3 I proffer that if I put Mr. Rai on
4 the stand, he would say that only senior
5 management can get this information and only if
6 they have a specified purpose for why they are
7 asking for it. It's financial information,
8 confidential. It's kept confidential within
9 Agere, so it's a trade secret.

10 And under the standard of the
11 Federal Circuit, it's the type of information
12 that Courts would protect, trade secret, and it
13 would be incredibly harmful and detrimental to
14 Agere if it were given to the public.

15 Again this was information that
16 was produced under the protective order marked
17 "Attorney's eyes only."

18 That's the first document, so it
19 would be accounting information. That's JTX 16.

20 The next document, JTX 52, is the
21 sales data for every single Agere modem within
22 the various categories of product numbers from
23 2001 through 2008 by quarter, by product, by
24 customer. This information, I would also

1 proffer Mr. Rai would testify, is a trade
2 secret.

3 It has confidential pricing
4 information. All the Courts, Delaware and Third
5 Circuit, have always said that price lists,
6 pricing information, and customer information
7 are trade secrets under the law.

8 This exhibit, JTX 52, gives you
9 pricing information, and it gives you how much
10 of each product the customer purchased, and it
11 goes all the way through the history. If you
12 had this document and you were a competitor, you
13 could see that Customer X purchased this amount
14 in 2001, 2002, 2003.

15 It would show you how the
16 progression of the relationship between Agere
17 and various customers progressed over time.

18 It would talk about all the
19 different pricing strategies that Agere has with
20 its modems by both the modem type and the modem
21 customer.

22 This is incredibly confidential
23 information that would give you a road map to
24 exactly what Agere's business is with respect to

1 modems, so if it fell in the hands of a
2 competitor or a licensing entity or if it was
3 put on the internet, it would be incredibly
4 detrimental to Agere if this information were
5 exposed.

6 Again this information is pricing.
7 It is a trade secret, and it would be incredibly
8 harmful if this information was released to the
9 public. That's the second.

10 The first category was financial
11 information. The second category was sales
12 data.

13 The third category, which is a
14 number of exhibits that starts at DX 284 and
15 goes to PPX 38, PPX 39, PPX 40, PPX 41, PPX 42,
16 PPX 43, PPX 44, and PPX 45, that is -- each one
17 of those exhibits is a yearly listing of every
18 Agere shipment of every one of its modem
19 products.

20 What that information shows is, it
21 has every single Agere customer, and it also
22 lists -- as the Court may recall from the trial,
23 it lists both the ODM, original distribution
24 manufacturer, and then the ultimate customer, so

1 it also shows a relationship between what
2 ultimate customer -- which company they are
3 using to manufacture their boards, so it
4 establishes that relationship, which is also
5 highly confidential.

6 So again this information gives
7 you all the customers. It gives you all the
8 products, and it gives you pricing and volume
9 information. Again this is Agere's entire
10 business if this was given out.

11 If you recall, these documents are
12 incredibly detailed. They're produced in
13 electronic form. They can be manipulated by a
14 third party, and they are also thousands and
15 thousands and thousands of lines long, many
16 times over eight thousand lines.

17 Every time Agere ships a modem,
18 it's included in that. Again it's per se trade
19 secret information. I proffer to say both with
20 respect to the sales data and this shipment data
21 -- when I say "shipment data" I mean DX 284
22 through PPX 38 through 45 -- all of that is
23 trade secret. It's customer lists, pricing
24 lists again. It's a road map to their business,

1 and it would be highly prejudicial if that
2 information got out to the public or to any
3 entity.

4 That covers the second -- or the
5 third category of documents. Again those are
6 all trade secrets. Every Court has uniformly
7 said that trade secret is protected and widely
8 acknowledged by the Third Circuit. All that
9 information was marked "Attorney's eyes only"
10 under the protective order in this case.

11 The fourth category of documents
12 are JTX 53 and 54. If you recall, Your Honor,
13 the parties had agreed to allow the jury to show
14 the damage calculations. These two are with
15 respect to GE's damage expert, Miss Julie Davis.
16 She had two different theories of damages, and
17 this information shows by year the total number
18 of modems she believes the information should be
19 applied to.

20 Now, our objections to these
21 documents is if you had these documents and you
22 had the transcript, you could pull out from that
23 Agere's total sales per year of both its hard
24 and soft modems.

1 The breakdown between hard and
2 soft modems is confidential, as well as the
3 total sales numbers, and what it would show to a
4 competitor is, it shows trends because it has
5 information from 2001 all the way to 2008. It
6 can show how the differences between hard and
7 soft modems changed over time again.

8 That is confidential information
9 that I proffer to you that Mr. Rai would testify
10 is not generally known to the public and would
11 be harmful to Agere if it came to a competitor
12 or party that was trying to license intellectual
13 property to Agere because you could derive from
14 that document Agere's total sales numbers and
15 how it progressed over time with the breakdown
16 between hard modems and soft modems.

17 The next category of documents,
18 Your Honor -- we noted this in our letter -- are
19 demonstrative exhibits only, PDX 91 through PDX
20 97.

21 As we noted in the letter, there's
22 a question in our mind whether these documents
23 are, quote, judicial records. They were never
24 admitted into evidence.

1 THE COURT: I can help you out
2 there. They're not, and we make that clear
3 here, that demonstratives are used in the
4 courtroom for the aid of the jury, but they're
5 not admitted into the record, so they are not
6 court documents.

7 MR. YOUNG: Those are no longer an
8 issue.

9 The last document that we have,
10 Your Honor -- and we noted this in our letter as
11 well -- the requester, Ms. Bonner, requested a
12 PPX 488, which is the last document put on her
13 letter.

14 As we noted in our opposition,
15 there is no document PPX 488 that was admitted
16 at trial. We, upon filing these letters,
17 provided these letters as a courtesy to
18 Ms. Bonner on July 29th, so she was aware of our
19 notation that this is not an exhibit that was
20 admitted in trial, and she has not, to our
21 knowledge, ever amended her request to request
22 any other exhibit, so we believe that there's
23 not an adequate request for any document PPX
24 488.

1 However, as an abundance of
2 caution, we put in our letter that she might
3 have -- we don't know one way or the other --
4 been requesting PPX 448, and that, Your Honor,
5 is a fair-market evaluation that LSI engaged
6 Deloitte and Touche to perform over Agere as
7 part of its merger transaction with Agere, and
8 we have Mr. Dwight Kempf here from Agere who is
9 very familiar with the document and can give you
10 particularized testimony about how harmful that
11 is to Agere.

12 I'll proffer that he'll say the
13 following: The first, that document is an
14 evaluation of every single business that Agere
15 is in. It analyzes all their costs, and it
16 analyzes their revenue, and it projects, on a
17 cash-flow basis, how much that business should
18 be valued over time.

19 This document is a blueprint not
20 only of Agere's modem business as the other
21 documents were, but it's a blueprint of Agere's
22 entire company.

23 This document is a manifestation
24 of numerous interviews that Deloitte and Touche

1 engaged all of Agere's employees over every
2 single aspect of its business: Finance,
3 production, manufacturing, sales, and all its
4 business models. It has confidential
5 information from every single aspect of Agere's
6 company, and then it performed these evaluations
7 on that information.

8 The document is -- has a valuation
9 date in 2007, but the document is still highly
10 confidential as of today. With information
11 that's available through public filings with the
12 SEC, any kind of competitor could get the
13 document, compare it to the publicly available
14 information, and assess how Agere's business is
15 doing, where it's going. It could analyze the
16 synergies of the agreement of the underlying
17 merger between LSI Agere and see how those have
18 progressed over time.

19 It would be allowing a competitor
20 to have full access to Agere, all its
21 businesses, and be able to make independent
22 assessments of the business.

23 And from a competitor's
24 standpoint, as an example, if it was in a

1 particular business that Agere was involved
2 with, they could look at the information in this
3 document. They could assess how profitable
4 Agere's business is. They could try to undercut
5 them on sales. They could find out customer
6 information. They could essentially have
7 incredible intelligence about Agere's business,
8 and, quite frankly, how LSI's business, when the
9 two were separate companies -- how the two
10 interact with each other.

11 Again it's an incredibly important
12 document to Agere. It's a trade secret. This
13 document is not widely distributed within Agere
14 at all. In fact, I will proffer to you that
15 Mr. Kempf would say that it takes a great deal
16 of effort to get this document. Only certain
17 people in the finance department can get it, and
18 only if they have a particularly good reason to
19 look at it.

20 Again this document is clearly a
21 trade secret, and it would be incredibly harmful
22 if it were released to anybody.

23 I know you had a statement and
24 questions about whether this depends on who the

1 requesting party is, and I would say, at least
2 with respect to Agere's documents, it is
3 incredibly harmful no matter who it's released
4 to.

5 All of these documents were under
6 the protective order in this case, and if these
7 were released to outside, then the horse is out
8 of the barn with respect to all this
9 information, particularly with respect to
10 Agere's modem business, and this last document,
11 448, if that's what Ms. Bonner is looking for,
12 that is with Agere's entire business.

13 These are all the trade secrets.
14 There is no question these are protectable, both
15 in District Court with cases here, and also with
16 respect to the Third Circuit.

17 Your Honor, I think pending any
18 questions you have, I think that describes the
19 various categories of documents.

20 And, Your Honor, just to make sure
21 the record is clear, I know this is effectively
22 done with the letters themselves, but as a
23 relief, we are asking the Court to enter a
24 protective or confidentiality order over these

1 documents so they cannot be released.

2 And if the Court were to be
3 inclined to produce any of these documents, we
4 would respectfully ask the Court to stay its
5 order so we could evaluate any potential relief
6 we could get on behalf of the Third Circuit.

7 Again these are sensitive
8 documents. We have brought witnesses from Agere
9 who can answer any particular questions Your
10 Honor may have to ask about the documents beyond
11 the proffer I've just given.

12 THE COURT: All right. Thank you.

13 If I were to order any of the
14 documents, I would indicate my order and the
15 reasons and then give you an opportunity to
16 appeal it --

17 MR. YOUNG: Thank you.

18 THE COURT: -- without providing
19 to the requester.

20 MR. YOUNG: Thank you.

21 THE COURT: Okay.

22 Is there anything else for --

23 MR. CONNOLLY: If I can just add
24 one quick thing, Your Honor?

1 We also have from potential
2 witnesses from GE as well. My earlier statement
3 about the documents can be thought of as a
4 proffer from Kenneth Glick from GE as well.

5 THE COURT: I'll accept them as
6 that.

7 MR. CONNOLLY: One other thing
8 that Mr. Young's statement made me think of is
9 that many of our documents -- and certainly we
10 would consider them trade secrets as well.

11 GE's business is different than
12 Agere's in this situation, and the particular
13 documents that have been requested from GE go
14 straight to how GE conducts its business, the
15 particulars of that. Highly sensitive trade
16 secrets.

17 The operating agreement itself,
18 there's many parts of that, but there's an
19 attachment to it that literally [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 That's why it's kept highly confidential.

24 That's why it's sensitive to GE and why it's

1 treated as such within this case.

2 And toward that end with some of
3 these other documents, they are broad documents.
4 They go not just to the issues brought up in
5 this case, not just to the specific portions of
6 those documents brought up in this case, but to
7 other portfolios that GE owns and particulars
8 relating to those.

9 I think this is a case where
10 you've got documents that, wholesale, should
11 never be released, even if that's the ultimate
12 decision, because portions of those documents
13 weren't at issue in this case, were never
14 intended to be, and weren't discussed in any
15 way.

16 THE COURT: All right. Okay.

17 What I'm going to do is take it
18 under advisement, and I am going to determine
19 whether it's appropriate to send a response to
20 the requester saying that there's been an
21 assertion of trade secret and confidentiality
22 and a request that a protective order be entered
23 as to the documents, and in order to balance and
24 assess the request against that assertion, it

1 would be helpful to know the identity of the
2 real party making the request.

3 If I decide not to do that, then
4 I'll address the request directly and either
5 grant it, deny it, grant it and deny it in part.
6 Whatever I do there, though, I'll be certain
7 that nothing is turned over if there is a
8 release order that wouldn't give you the
9 opportunity without the documents going over to
10 appeal.

11 MR. YOUNG: Your Honor, may I ask
12 one question? One more thing on the record.

13 One thing that may be appropriate,
14 Your Honor, for your consideration is if you
15 were to deny the -- or to grant the protective
16 order in this case, if you were concerned about
17 the identity of the ultimate requester of those
18 documents, as part of your analysis, one thing
19 Your Honor could do is grant the protective
20 order.

21 Then if they want to challenge
22 that, which they could theoretically do, they
23 could try to intervene in the case for the
24 purposes of challenging the protective order,

1 and through that process, they would identify
2 who they were.

3 THE COURT: I could let them do it
4 after the decision and the Freedom of
5 Information Request is denied, and they come in
6 formally.

7 MR. YOUNG: That way you can deny,
8 and if they truly want these documents and they
9 think they have a basis to do it, they could try
10 to intervene.

11 THE COURT: I think you know who
12 it is. You're just not telling the rest of us.

13 MR. YOUNG: Your Honor, I have no
14 idea who the party is.

15 THE COURT: You don't have to
16 answer that.

17 Thank you very much. This has
18 been helpful.

19 THE CLERK: All rise.

20 (Proceeding ended at 4:18 p.m.)
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23
24

1 C E R T I F I C A T I O N

2 I, DEANNA WARNER, Professional
3 Reporter, certify that the foregoing is a true
4 and accurate transcript of the foregoing
5 proceeding.

6 I further certify that I am
7 neither attorney nor counsel for, nor related to
8 nor employed by any of the parties to the action
9 in which this proceeding was taken; further,
10 that I am not a relative or employee of any
11 attorney or counsel employed in this case, nor
12 am I financially interested in this action.

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DEANNA WARNER